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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 272

WILLIAM E. MIEDEMA,

Petitioner,

vs.

SADIE PRATT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

FRED ROLAND ALLABEN,
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(Figures in parentheses refer to pages of printed record unless context indicates otherwise)

MAY IT PLEASE THE COURT:

The petitioner, William E. Miedema, respectfully petitions this Honorable Court for a Writ of Certiorari to the Supreme Court of Michigan in the case of *Pratt* v. *Miedema*, 311 Mich. 64, 18 N. W. (2d) 279, and shows unto this Court as follows:

I

Summary Statement of Matter Involved

This case involves the matter of enforcement in the State of Michigan of a foreign divorce decree secured in the State of Nevada (45-47), where the undisputed proofs

show that the respondent who secured the Nevada divorce and custody of the minor children, and said children for whom an award of alimony was there made were domiciled in the State of Michigan.

A suit was filed in the Michigan court by respondent against petitioner, and a summary judgment entered therein requiring petitioner to pay respondent the alimony for the support of the parties' minor children as ordered in the Nevada divorce decree (98).

The parties hereto were married on July 30, 1924 in Grand Rapids, Michigan (14). They lived together in Grand Rapids, Michigan as husband and wife until July 31, 1941, when respondent filed suit for divorce against petitioner in the Circuit Court of Kent County in Grand Rapids, Michigan (14). The case was tried before that court and after full hearing resulted in a dismissal of respondent's suit on November 12, 1941, the Michigan court finding that she had failed to establish any grounds for divorce (14). Immediately thereafter this petitioner requested his wife to return to their home which she had previously left without justifiable cause (14). Respondent however went to the State of Nevada on February 3, 1942 and filed suit for divorce in that State (15). This petitioner did not appear in that suit and on May 16, 1942 respondent secured a default decree of divorce (23). On July 8, 1942 petitioner herein filed a suit against respondent in the Kent County Circuit Court at Grand Rapids, Michigan, asking for a declaratory judgment setting aside respondent's Nevada divorce decree of May 16, 1942 (15). After trial of that case before a jury, judgment was entered on December 3, 1942 in the Michigan Court in conformity with the verdict of the jury of November 23, 1942, declaring respondent's said Nevada divorce decree void (15).

Immediately after the verdict in that case and before

the decree had been formally entered, respondent again went to the State of Nevada for the purpose of securing another divorce in that State (16). Letters written by respondent at that time and subsequently, were introduced in the present action showing clearly and indisputably that respondent's domicile during all this time was in Grand Rapids, Michigan and that she committed an absolute fraud upon the Nevada Court and upon the petitioner herein in securing her second Nevada divorce (52-87). Her action was also a fraud upon the courts of the State of Michigan, and was an attempt to circumvent the legal effect of the two Michigan decisions that were adverse to respondent. These letters written by respondent to her sweetheart after she had returned to Nevada show clearly that respondent had gone to Nevada this second time for the sole purpose of securing a divorce and intended to continue her domicile and reside in Michigan after securing the same. In her letter of November 30, 1942 she said: "Arrived at 2:10 A. M. (57) this morning, so took children to the Overland Hotel, where we shared a double bed. * * * Also thought by taking same place would verify my statement as to having paid my rent in advance. * * * Our baggage had not arrived by noon as yet so we are handicapped a little (58). * * * Expect to start saving at once for our return fares * * *. Hope when I get this amount saved it will be all settled and OK to return * * *" (58). In her letter of December 23, 1942 she stated: "Wish it were time for you to be looking for an apartment for us already" (67); and on January 13, 1943 she wrote: "Yet I do not wish to make a hasty move and perhaps regret it afterwards. It simply must be good the next time I come to Michigan" (71).

Respondent then started her second suit for divorce in Nevada on January 29, 1943 (41, 68), immediately after the rendering of this Court's opinion in the first case of

Williams v. *North Carolina,* 317 U. S. 287, 63 S. Ct. 207. Because of a general misunderstanding of the ruling in the aforementioned *Williams* case, petitioner herein upon being served with notice of the Nevada suit, entered his appearance therein and contested the same (28-35). The Nevada case after hearing, resulted in a divorce being granted respondent on May 19, 1943 (45-47). The decree was granted on the ground that petitioner herein had neglected to support respondent for more than a year preceding the filing of her second bill of complaint in Nevada (43), although the undisputed facts show that during all that time respondent was apparently married to her sweetheart, William Pratt (87-88). Furthermore, the facts are undisputed that respondent had deserted petitioner herein and abandoned their home after her unsuccessful attempt to secure a divorce from petitioner in the State of Michigan (14).

Although the Findings of Fact and the Conclusions of Law of the Nevada Court state that respondent was a resident of Nevada for more than six weeks immediately preceding the commencement of her second divorce there (41), the formal decree entered by the Nevada Court May 19, 1943 makes no such finding or statement therein (45-47). The decree besides giving respondent a divorce from petitioner, gave her custody of the two minor children and required the petitioner herein to pay $30.00 per month each, for the support of such children. No alimony or support was awarded respondent (45-47). After the granting of the divorce respondent came back to Michigan and has lived here ever since with said William Pratt. She filed this present suit against petitioner in the Superior Court of Grand Rapids, Michigan on August 27, 1943 (*V*). Her declaration showed her suit was based upon a claim for alimony for the support of the minor children under the Nevada divorce decree of May 19, 1943 (4-5). Answer

was filed by petitioner herein denying the validity of the divorce decree and denying that respondent was entitled to a judgment (6-9). Respondent herein then filed a motion for Summary Judgment (11-12). Objections were filed by petitioner (12-13), and two affidavits of merit filed by him (14-18, 47-51).

During the hearing on the motion for summary judgment the attorney for the respondent herein stated in open court: "You have to start off in connection with a summary judgment of course, that everything that the defendant claims as a matter of fact is true. Well, I am going to argue this case upon that assumption that everything that they claim in their answer is true, and so proceeding on that basis I am not dodging the issue one bit" (19). The trial court in this action thereafter rendered an opinion granting the motion for summary judgment in favor of respondent herein against this petitioner, on the ground that the full faith and credit provision of the Federal Constitution was not involved, and that the Nevada decree could not be collaterally attacked (89-98). Judgment for Seven Hundred Twenty Dollars ($720.00) was entered in that case (98).

Timely appeal was made by petitioner herein to the Supreme Court of the state of Michigan (3), claiming, inter alia, that the trial court had erred in failing to hold the Nevada decree was a fraud; erred in holding that the Nevada decree was enforceable under the Full Faith and Credit Clause of the United States Constitution; erred in granting plaintiff a judgment as the Full Faith and Credit Clause of the United States Constitution does not authorize the enforcement of a foreign decree obtained by fraud and by fraudulent residence; erred in holding the Nevada Court had jurisdiction and authority over the persons and subject matter; and erred in holding that the Nevada decree could not be collaterally attacked (1-3).

The Supreme Court of Michigan rendered its opinion on April 9, 1945 affirming the trial court (101-104), and holding that the courts of Michigan MUST enforce the Nevada divorce decree under the Full Faith and Credit Clause of the United States Constitution (103). Timely motion for re-hearing was made in the Michigan Supreme Court (106-7). The motion was denied by the Michigan Supreme Court on May 14, 1945 without opinion (112).

II

This Court Has Jurisdiction

Inasmuch as the matter of one state court being required to enforce the decree of another state court involves the Full Faith and Credit Clause in Article IV, Section 1, of the United States Constitution, this Court has jurisdiction of this case.

This provision of the Federal Constitution is as follows:

> "Section 1. Full Faith and Credit shall be given in each state to the public Acts, Records and judicial Proceedings of every other state. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."
>
> *U. S. Constitution, Art. IV, Sec. 1. See also 8 Fed. Code. Ann., Title 28, Paragraph 687.*

The validity and enforcement of one state court's decree in another state is clearly a subject of which the United States Supreme Court will take cognizance.

Williams v. *North Carolina,* 317 U. S. 287, 63 S. Ct. 207.

Williams v *.North Carolina,* 65 S. Ct. 1092.

Carpenter v. *Strange,* 141 U. S. 87, 11 S. Ct. 960.

Mr. Justice Frankfurter in delivering the majority opinion in the last *Williams* case *supra,* appended the following footnote at page 1095, 1096:

> "Since an appeal to the Full Faith and Credit Clause raises questions arising under the Constitution of the United States, the proper criteria for ascertaining domicil, should these be in dispute, become matters for federal determination."

In instituting this suit in the trial court for enforcement of the alimony provision of the Nevada divorce decree, the respondent herein claimed a constitutional right under the Full Faith and Credit Clause of the Constitution to have such Nevada decree recognized as valid and enforceable in the State of Michigan. The petitioner herein (defendant in the trial court) filed his answer to plaintiff's declaration and claimed that said Nevada divorce decree was void and unenforceable as it was "procured by fraud of plaintiff and was based upon a fraudulent residence" (6); He further denied, " • • • that said provisions for alimony in said alleged decree are valid or enforceable as they are indefinite as to time, and it would be against public policy of this state to enforce the same because of its indefiniteness, the fraudulent basis for the entry of the same and the fact that said minor children were at said time and now are domiciled and residents of the state of Michigan, and during all the time of the matter involved herein, and at the present time were and are under the sole jurisdiction of the courts of the State of Michigan" (6). He further specifically made reference to the fact that the Full Faith and Credit Clause of the Constitution would not allow or require enforcement of this fraudulent foreign decree, and stated in his answer, " • • • that the alleged decree of divorce was obtained by plaintiff by fraud, and it therefore is not entitled

to full faith and credit in this state • • •" (7). Petitioner's answer in the trial court fully raised the defense that plaintiff therein (respondent herein) had always been domiciled in Michigan and had never had a bona fide domicile in the state of Nevada, and that her decree of divorce in Nevada was therefore void and unenforceable in Michigan, and that the previous Michigan decision denying respondent herein a divorce in this state had become res judicata, and her Nevada divorce was a fraud upon the courts of this state (6-8). In petitioner's affidavit of merits in opposition to respondent's motion for summary judgment, he again specifically raised the defense with the following statement:

> "Deponent further says that said purported decree is not a valid decree enforceable in this state as the same was obtained upon fraudulent representations of the plaintiff herein as to residence and domicile, she being at that time a resident and domiciled in the city of Grand Rapids, Michigan and not being a bona fide resident domiciled in the State of Nevada" (16).

In his affidavit of merits he further alleged:

> "• • • that said decree • • • is not entitled to full faith and credit in this state • • •" (17).

Petitioner herein further stated in his supplemental affidavit opposing respondent's supplemental affidavit in support of her motion for summary judgment:

> "• • • that it is clear that plaintiff secured her purported decree of divorce in the state of Nevada upon a fraudulent domicile as evidenced by the annexed true copies of letters written in said plaintiff's own handwriting • • • said letters having been written and mailed by said plaintiff to said William A. Pratt, with whom it is evident from said letters written in plaintiff's own handwriting, she was consorting with

and conspiring to defraud both the Michigan courts and the Nevada courts" (48).

Although the decisions of the trial court and the Michigan Supreme Court were adverse to petitioner herein, this court has jurisdiction of the federal questions by reason of the following quoted statute:

> "It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, * * *. Where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States; and *the power to review under this paragraph may be exercised as well* where the *Federal claim is sustained as where it is denied.*" (Italics ours.)
>
> *8 Fed. Code Ann. Title 28, Par. 344(b).*

Contrary to our contention, the Supreme Court of the State of Michigan is of the belief that it is required to enforce the Nevada divorce decree by reason of Article IV, Sec. 1 of the Federal Constitution. In its opinion, the Supreme Court of Michigan stated:

> "* * * and under the Full Faith and Credit Clause of the Federal Constitution (Article IV, Section 1) (the decree) must be respected in Michigan courts" (103).

The federal questions involved herein were duly raised and protected on appeal from the trial court to the Michigan Supreme Court (2). In petitioner's reasons and grounds for appeal (1-3) from the trial court to the Michigan Supreme Court it was specifically claimed that:

> "(4) The court erred in failing to hold that plaintiff's Nevada divorce was obtained by fraud.

"(6) The court erred in permitting plaintiff to commit a fraud upon the Michigan courts and to wipe out previous Michigan court decisions adverse to her.

"(8) The court erred in holding that the fraud of plaintiff in procuring her Nevada divorce could not be considered.

"(9) The court erred in holding that the Nevada decree was enforceable under the Full Faith and Credit Clause of the United States Constitution.

"(10) The court erred in granting plaintiff a judgment as the Full Faith and Credit Clause of the United States Constitution does not authorize the enforcement of a foreign decree obtained by fraud and fraudulent residence.

"(11) The court erred in holding that defendant was collaterally attacking plaintiff's Nevada decree.

"(12) The court erred in holding that the Nevada court had jurisdiction and authority under and over the persons and subject matter"(1-2).

The matters involved in this appeal are substantial. The decision of the Michigan Supreme Court in this case is directly contrary to the holding in the case of *Andrews* v. *Andrews*, 188 U. S. 14, 23, S. Ct. 237. It was held in that case that a decree of divorce granted in the state of South Dakota when the parties were domiciled in Massachusetts was void and unenforceable in Massachusetts, *even though both parties had appeared in the South Dakota divorce proceeding.* There is no decision of the United States Supreme Court actually deciding contrary to the *Andrews* case, particularly on facts as in the present action where it has been admitted by the pleadings and by counsel in open court that the claims of the petitioner herein as to the domicile of the parties and the fraud of the respondent are true. There is some dicta to the contrary in the recent decision in the case of *Williams* v. *North Carolina*, 65 S. Ct. 1092,

and in the case of *Davis* v. *Davis*, 305 U. S. 32, 59 S. Ct. 3, but these statements are pure dicta, or the facts of the case are clearly distinguishable as we will more fully point out in Section IV of this petition.

This court has also held that a foreign decree may be impeached collaterally in another state.

German Savings & Loan Society v. *Dormitzer*, 192 U. S. 125; 24 S. Ct. 221;

Williams v. *North Carolina*, 65 S. Ct. 1092.

We shall also discuss these cases in Section IV of this petition.

This case involves the sacred right of an individual to maintain the marital status, his home and his family in Michigan where these parties have always been domiciled. The Michigan court in respondent's first divorce suit held this petitioner blameless and denied that his spouse had any valid grounds for divorce. That decision was res judicata and should have been so recognized by the Nevada court. This case involves the right of the state of Michigan to have exclusive jurisdiction of the minor children domiciled therein. It involves the right of a Michigan resident to protect his real estate located in Michigan from the fraudulent decree of a foreign state. It involves the fundamental right of a citizen to be protected from the involved and unconscionable results of an admittedly fraudulent, illegal foreign decree of divorce.

The decision of the Michigan Supreme Court in this case was entered April 9, 1945 (101-104), *Pratt* v. *Miedema*, 311 Mich. 64. Within the time allowed by Michigan Court Rule 71, Section 4, a motion for rehearing was filed in the Michigan Supreme Court (106-107) on April 24, 1945. Thereafter the motion was submitted to the Supreme Court and on May 14, 1945, said motion was denied without opinion (112). This petition for writ of certiorari is filed July 28, 1945.

III

The Questions Presented

Two fundamental questions are involved in the present matter:

One. Does the Full Faith and Credit Clause of the United States Constitution (Article IV, Section 1) demand that the Michigan courts MUST enforce a Nevada decree divorcing parties domiciled in the state of Michigan, simply because the defendant therein appeared in the Nevada proceeding, when the undisputed facts and admission of counsel show that the Nevada divorce was obtained by fraudulent representations of the respondent as to her domicile.

The Michigan Supreme Court held: Yes.
The petitioner herein contends: No.

Two. Does a Nevada court divorcing citizens domiciled in the state of Michigan have power to reach its arm into the state of Michigan and control the matters of custody and support of the minor children of such parties, which children all their lives have been and now are domiciled in the state of Michigan?

The Supreme Court of Michigan held: Yes.
The petitioner herein contends: No.

IV

Reasons for Allowance of Writ

To allow the Michigan Supreme Court's decision to stand will result in a most shocking and unconscionable result which is contrary to the law of the United States. It would open the door to wholesale fraud, connivance and collusion in the securing of foreign divorces; it would wrestle away

from the mother state, the true domicile of both parties and their children, the inherent right and duty of overseeing and protecting its own citizens, the sacred marriage relationship, the property accumulated, and the innocent children resulting from such marriage. Furthermore, it would take away from the United States Supreme Court the right it so recently expounded in the *Williams* decision of determining the matter of domicile in such cases.

The unconscionable result of the Michigan Court's decision in the present case was aptly stated by Justice Cooley in the case of *People* v. *Dawell,* 25 Mich. 247, 256:

> "Such a doctrine is not only monstrous in its results, but it has, as I conceive, no support whatever in authority."

1. *Petitioner's appearance in the Nevada case does not require the Michigan court to enforce the fraudulent Nevada divorce decree.*

The case of *Andrews* v. *Andrews,* 188 U. S. 14, 23 S. Ct. 237, is directly in point with petitioner's position in this case, and is sound authority for the allowance of the writ of certiorari herein. In that case the plaintiff husband left the State of Massachusetts where he and his wife were both domiciled, for the purpose of instituting a suit for divorce in South Dakota. As in the case at bar, defendant appeared in the South Dakota divorce proceeding. A decree of divorce was granted by the South Dakota court later, upon the property matters of the parties being amicably settled and defendant "with-drawing" from the case. Plaintiff therein returned to Massachusetts after securing his South Dakota divorce decree and remarried. Upon his death a contest arose between the first and second wife as to the appointment of the administrator of his estate. The Massachusetts Supreme Court held the South Dakota decree void on the ground that the parties were domiciled

in Massachusetts at the time the decree was granted. This holding was affirmed on appeal to this court. Concerning the question of the Full Faith and Credit Clause of the Constitution, Mr. Justice White speaking for this court declared on page 37 in the *Andrews case:*

> "As the State of Massachusetts had exclusive jurisdiction over its citizens concerning the marriage tie and its dissolution, and consequently the authority to prohibit them from perpetrating a fraud upon the law of their domicil by temporarily sojourning in another state, and there, without acquiring a bona fide domicil, procuring a decree of divorce, it follows that the South Dakota decree relied upon was rendered by a court without jurisdiction, and hence the due Faith and Credit Clause of the Constitution of the United States did not require the enforcement of such decree in the state of Massachusetts * * *."

The Michigan Supreme Court in deciding the present case (101-104) held that it was bound to give full faith and credit to the Nevada divorce decree by reason of this court's decision in the case of *Davis* v. *Davis,* 305 U. S. 32, 59 S. Ct. 3. It is palpable that the *Davis case* is distinguishable from the present action and has no application to the facts herein. In that case this court held that a decree of divorce granted in Virginia after a contest must be given full faith and credit in the courts of the District of Columbia. This court, however, was very careful in that case to point out as stated on *page 41* therein.

> "It is enough to say that care should always be taken to determine upon the facts and circumstances of each case whether in accordance with the general rule, it is the domicile of the husband. * * * In this case the wife has been adjudged by the decree a mensa et thoro, on which she relys to have disrupted the marital relation."

The court also made a finding in that case that the husband had actually acquired a valid domicile in the state of Virginia before securing his divorce there, and made the following statement concerning the same on *page 42* therein:

> "In view of these facts and of her conduct adjudged repugnant to the marital relation it would be unreasonable to hold that his domicile in Virginia was not sufficient to entitle him to obtain a divorce having the same force in the District as in that state."

The facts in that case and the decision itself pointing out the finding of a valid domicile, distinguishes it clearly from the present case, wherein it must be admitted and the proof is undisputed that respondent herein did not have a valid domicile in Nevada but that her domicile was in Michigan at the time she secured her fraudulent Nevada divorce decree. In fact, the decision in the *Davis case supra* affirms our contention that the matter of domicile must be carefully inquired into and that, as stated in the *Davis case*, "Care should always be taken to determine upon the facts and circumstances of each case whether in accordance with the general rule it is the domicile of the husband." This the Michigan Supreme Court refused to do in the present action. It refused to make any inquiry into the matter of domicile and merely stated: "* * * under the Full Faith and Credit Clause of the Federal Constitution * * * (the Nevada decree) must be respected in Michigan courts" (103). The Michigan decision is also contrary to the very recent statement of the majority opinion in the case of *Williams* v. *North Carolina* 65 S. Ct. 1092, 1095, (footnote 7) as follows:

> "Since an appeal to the Full Faith and Credit Clause raises questions arising under the Constitution of the United States the proper criteria for ascertaining

domicil, should these be in dispute, become matters for Federal determination."

Further language in the late *Williams case supra* makes it imperative for a state court to inquire into the matter of domicile of the parties when the matter of enforcing a foreign decree arises.

> "But simply because the Nevada court found that it had power to award a divorce decree cannot we have seen, foreclose reexamination by another State. Otherwise, as was pointed out, a court's record would establish its power and the power would be proved by the record. Such circular reasoning would give one state a control over all the other states which the Full Faith and Credit Clause certainly did not confer."
>
> *Williams* v. *North Carolina,* 65 S. Ct. 1092, 1097.

Such circular reasoning referred to by Mr. Justice Frankfurter in the above quotation would apply equally well in the case where there has been an appearance as where there has been no appearance. Mr. Justice White made this clear when he said in the *Andrews case supra* at *page 40:*

> "Nor is there force in the suggestion that because in the case before us the wife appeared, hence the South Dakota court had jurisdiction to decree the divorce. The contention stated must rest on the premise that the authority of the court depended upon the appearance of the parties and not on its jurisdiction over the subject matter—that is, bona fide domicile, irrespective of the appearance of the parties. But it is obvious that the inadequacy of the appearance or consent of one person to confer jurisdiction over a subject matter not resting on consent includes necessarily the want of power of both parties to endow the court with jurisdiction over a subject matter, which appearance or consent could not give."
>
> *Andrews* v. *Andrews,* 188 U. S. 14, 40.

We call particular attention to the statement in the case of *German Savings & Loan Society* v. *Dormitzer,* 192 U. S. 125, 24 S. Ct. 221, part of which was quoted by Mr. Justice Frankfurter in the late *Williams case, supra.* The complete statement in the *Dormitzer case* is:

> "It is too late now to deny the right collaterally to impeach a decree of divorce made in another state, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction, and the *appearance of the other party. Andrews* v. *Andrews,* 188 U. S. 14, 39; S. C. 176 Massachusetts 92, 93. An attempt was made to void the authority of *Andrews* v. *Andrews* by the suggestion that there the respondent in the divorce suit had disappeared before the decree. But a respondent cannot defeat jurisdiction by disappearing. Indeed, in strictness only the attorney disappeared, and the respondent simply ceased to defend the suit." (Italics ours.)
>
> *German Savings & Loan Society* v. *Dormitzer,* 192 U. S. 125, 128.

The italicized portion of the above quotation was omitted from Mr. Justice Frankfurter's quotation from the *Dormitzer* case in his opinion in the late *Williams* case, *supra.* We believe this portion of the quotation from the *Dormitzer* case extremely important and as bearing squarely upon the proposition involved herein. If the Federal courts are empowered to inquire into the domicile of the parties in these cases which the late *Williams* case definitely settled, then clearly and logically it can make no difference whether or not the defendant appeared in the foreign suit.

True, Mr. Justice Frankfurter made the statement in his opinion in the late *Williams* case, *supra,* that that case was not one where both parties had appeared in the foreign suit, and he cited the *Davis* case. This statement, however, in the *Williams* case is purely dictum as it has

no effect whatever upon the decision therein. The late *Williams* case, *supra,* actually held that domicile is "an indispensable prerequisite to a state court's jurisdiction to grant divorce."

> "* * * the Nevada decrees are void on the basis that the Due Process Clause makes domicil an indispensable prerequisite to a state court's 'jurisdiction' to grant divorce."

In discussing the effect of the majority decision in the late *Williams* case on the former decision in the *Davis* case, Mr. Justice Black stated in his dissent:

> "Whether the court today over-rules that case, (Davis case) I cannot be sure. Certainly, if a state court cannot finally determine the question of domicile because it is a federal question, each divorce controversy involving domicile must be subject to review here, whether both parties appear or not."
>
> *Williams* v. *State of North Carolina,* 65 S. Ct. 1092, 1114.

The logic of this conclusion is inescapable. A careful analysis of the *Andrews* case, the *Dormitzer* case, the *Davis* case, and this late *Williams* case leads to the one inescapable result, namely: the matter of domicile of the parties to a foreign divorce decree may be collaterally attacked and inquired into by the other states regardless of whether or not both parties appeared in the foreign suit. We do not believe the *Davis* case is inconsistent with this conclusion, because this court in the *Davis* case in reviewing the decision of the court of the District of Columbia inquired into the matter of domicile of the parties and found as a fact that a valid domicile had been established in the State of Virginia prior to the granting of the decree of divorce in that state. As Mr. Justice Black clearly pointed

out in his dissenting opinion in the late *Williams* case, *supra:*

> "It (The Supreme Court in the Davis case) decided that where both spouses appeared a state court could finally determine the question of domicile."

The Michigan Supreme Court refused to do this in the present action, although the facts are indisputable that the parties did not have valid domiciles in Nevada at the time respondent herein secured her decree of divorce. But if the *Davis* case is inconsistent with this conclusion then it should be over-ruled, if it has not been over-ruled already by the decision in the late *Williams* case.

Many years ago the great Justice Cooley of the Supreme Court of Michigan thoroughly analyzed the situation and laid down the rule with which the *Andrews* case and the *Dormitzer* case as well as the late *Williams* case are clearly consistent. Justice Cooley held that the matter of domicile could be inquired into for the purpose of collaterally attacking an Indiana divorce decree where the parties lived in Michigan, even though both parties appeared in the Indiana divorce case. He stated:

> "Now I understand the rule to be that to give the courts of any state jurisdiction over the marriage relation between a husband and wife, one of the parties at least must have a domicil within that state. Some of the judicial decisions make further requirements; but no court has ever held that any less could be demanded. It is, then, and must be, admitted on all hands that while these parties had their residence within this state, the courts of Indiana had no authority to consider the question of divorcing them. That was a matter which pertained exclusively to the authorities of this state."
>
> *People* v. *Dawell,* 25 Mich. 247, 254-255.

Justice Cooley in disposing of the claim that the appearance of the parties in the foreign court precluded the Michigan courts from inquiring into the matter of jurisdiction, stated at *page 257* in the *Dawell* case, *supra:*

> "But it is said that if the parties appear in the case the question of jurisdiction is precluded. That might be so if the matter of divorce was one of private concern exclusively. But such is not the case under our laws, nor will it ever be until it becomes to be understood that parties have the right to marry and unmarry at pleasure, and that if they choose to trade spouses, it is the concern of nobody but themselves. Such an understanding would require a considerable change in the existing laws of this state. As those laws now are, there are three parties to every divorce proceeding; the husband, the wife and the state; the first two parties representing their respective interests as individuals; the state concerned to guard the morals of its citizens by taking care that neither by collusion nor otherwise shall divorce be allowed under such circumstances as to reduce marriage to a mere temporary arrangement of conscience or passion."

Further on in the *Dawell* case, page 259, Justice Cooley discussed the matter of the Full Faith and Credit Clause of the Constitution as follows:

> "It is insisted, however, with great earnestness, that whatever might have been the case otherwise, the provision in the Constitution of the United States, that full faith and credit shall be given in each state, to the public acts, records and judicial proceedings of every other state, (Const. of U. S., Art. IV, Paragraph 1) will preclude our inquiry into the validity of this divorce. If that provision of the Constitution could be so construed as to protect and make valid a fraudulent proceeding like the one in question, it would certainly be a most singular perversion of its original purpose."

That the Nevada divorce in the present action is fraudulent and was obtained by respondent herein when she and her husband, petitioner herein, and their children were domiciled in Michigan, must be admitted. This proceeding arose on a motion for summary judgment to enforce alimony decreed in a Nevada court. Under the Michigan rules of practice and decisions thereunder, matters alleged in an answer must be accepted as true, if not specifically denied in the reply. In the present action respondent herein (plaintiff in the trial court) in her reply, made only a general denial of petitioner's specific allegations in his answer to the effect that her Nevada decree was obtained by fraud. (9) *Michigan Court Rule 24, Sec. 1,* provides:

> "New matter alleged in the answer filed in any action shall be answered by a reply in the same manner that allegations in the declaration or bill of complaint are required to be admitted or denied in the answer."

Michigan Court Rule 23, Sec. 2, provides:

> "Every answer shall contain an explicit admission or denial of each allegation in the declaration or bill of complaint as to which the defendant has knowledge or belief. * * * Every material allegation in the declaration or bill to which the defendant shall not make answer shall be taken as admitted by the defendant. In connection with every denial the answer shall set forth the circumstances of the matters which will be relied upon to support such denial. * * *"

The Michigan courts have held repeatedly that failure to make specific denial to allegations amounts to an admission of those allegations.

Detroit Trust Co. v. *Smith,* 256 Mich. 376, 240 N. W.;
Federal Gravel Co. v. *Detroit, etc., Ry. Co.,* 263 Mich. 341, 248 N. W. 839;
1 Searl Mich. Pleading & Practice, Sec. 168, page 224.

Furthermore, where an affidavit of merits is filed in opposition to a motion for summary judgment, as was done in the present action, it is universally held to be the province of the court to determine judicially whether there is an issue of fact, which, if resolved in favor of defendant, would preclude a verdict for plaintiff.

Baxter v. *Szucs*, 248 Mich. 672;
Appelbaum v. *Gross*, 191 N. Y. Supp. 710.

This fact is not to be determined alone from the affidavits on motion for summary judgment, but from all the pleadings and files in the case.

34 *Corpus Juris*, page 201, Sec. 424.

Accordingly, because of the manner in which the present proceeding arises namely, by motion for summary judgment, the court is duty bound to assume the facts set up in petitioner's affidavit of merits as true.

The written proof of the fraudulent domicile of plaintiff is in her own handwriting. In her letter of December 20, 1942 she wrote: "* * * I will merely avoid any service from Michigan (65). * * * you will have to maintain and keep up the home on Jefferson Ave. (Grand Rapids, Mich.) which I really want you to do anyway, for I believe we will be living in it sooner or later" (66). In referring to the first *Williams* case she wrote on December 23, 1942: "Do you realize that it will mean I can come back to Michigan and legally marry you" (68). On January 13, 1943 she showed her impatience to return to her home in Michigan by writing: "Just assure me dearest that you will not rush this thing too much because then I just want to get on the train and come home. Yet something inside of me says you better be guided by your legal advisers a little further" (73).

Further than that, however, in the present case we have the admission of respondent's counsel at the time of the hearing on the motion for summary judgment in open court that, "You have to start off in connection with the summary judgment of course, that everything that the defendant claims as a matter of fact is true. Well, I am going to argue this case upon that assumption that everything that they claim in their answer is true, * * *" (19).

Therefore, we have in the present action a clear distinction even from the *Davis* case, for here it is admitted that petitioner's claim, that the parties were not domiciled in Nevada and that respondent's decree was obtained by fraud, are true. Clearly Michigan courts are not required under the Full Faith and Credit Clause of the Federal Constitution to enforce a Nevada decree which has admittedly been fraudulently procured by a Michigan resident domiciled in Michigan. To allow such a fraudulent Nevada decree to be enforced in Michigan would lead to most unconscionable results. It would clearly open the door to wholesale fraud in violation of the Michigan statute requiring affirmative oath by a party seeking a divorce to the effect that there is no collusion or fraud in regard thereto. The Michigan statute in that regard provides:

> "No divorce shall be decreed in any case when it shall appear that the petition or bill therefor was founded in or exhibited by collusion between the parties; and the oath or affirmation administered to the complainant in swearing to such petition or bill shall in addition to all other legal requirements recite the following: 'And you do solemnly swear (or affirm) that there is no collusion, understanding or agreement whatever between yourself and the defendant herein in relation to your application for divorce.' * * *".
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> *Michigan Stat. Ann.*, Sec. 25.90.

The Nevada courts require no such affirmation as evidenced by the jurat on respondent's amended Nevada bill of complaint (27).

If the appearance of a party in a foreign divorce will preclude inquiry into the matter of domicile and fraudulent residence, it will then be a simple matter for married parties to procure a fraudulent divorce in a foreign state based on their collusive act of entering an appearance in the foreign jurisdiction.

2. The Nevada Decree Is Unenforceable in Michigan as Nevada Cannot Assume Jurisdiction Over the Minor Children of the Parties Hereto.

The portion of the Nevada decree in the present case sought to be enforced in this action is the award of support of $30.00 per month per child for the two minor children of the parties hereto (46, 4-5). The decree in that regard provides:

> "It is further Ordered, Adjudged and Decreed that the defendant pay to the plaintiff the sum of $30.00 per month for the support and maintenance of Barbara Jean Miedema, the first of said payments to be made on or before June 1, 1943 and a similar payment to be made by the defendant to the plaintiff on the first day of each and every month thereafter" (46).

Another identical paragraph provides the same for the maintenance of the other minor child, Gerald Jerome Miedema (46).

Clearly the Nevada court had no jurisdiction over these minor children or of their custody or over the matter of their support. Their domiciles were in Michigan where they had been born and always lived. True, respondent took them to Nevada at the time she secured her divorce, but as she had unlawfully abandoned the petitioner herein and as petitioner, the father of the minor children was domiciled

in Michigan, Michigan was the residence and domicile of said minor children.

Yarborough v. *Yarborough*, 290 U. S. 202, 54 S. Ct. 181.

In that case the plaintiff and defendant husband and wife were domiciled in Georgia. The Georgia court divorced them and awarded a lump sum of alimony for the support of the minor child. Thereafter the minor child moved to South Carolina and through a guardian sued her father for further support. Personal service was secured on her father in South Carolina. On appeal to this court it was held that the decree entered in Georgia where the parties were domiciled was binding and that by moving to another state the child could not attempt to set aside the control of the state of her domicile. Concerning the place of domicile of a minor child at the time of the entry of a divorce decree this court stated on page 211 in the *Yarborough* case:

> "Being a minor, Sadie's domicile was Georgia, that of her father, and her domicile continued to be in Georgia until entry of the judgment in question. She was not capable by her own act of changing her domicile. Neither the temporary residence in North Carolina at the time the divorce suit was begun nor her removal with her mother to South Carolina before entry of the judgment, effected a change of Sadie's domicile. It is true that under the Georgia Code a minor may acquire a domicile apart from the father if he has 'voluntarily relinquished his parental authority.' But the mere fact that the parents were living separate at the time the suit for divorce was brought and that Sadie was with her mother does not establish such relinquishment. Compare *Anderson vs. Watt, 138 U. S. 694, 706.* The character and extent of the father's obligation and the status of the minor are determined ordinarily not by the place of the minor's residence, but by the law of the father's domicile."

Also the courts of a foreign state have no power to control the custody and support of children domiciled in another state.

Titcomb v. *Sup. Ct.*, 220 Cal. 34, 29 P. (2d) 206;
Elliott v. *Elliott*, 181 Ga. 545, 182 S. E. 845.
Durfee v. *Durfee*, 293 Mass. 479, 200 N. E. 395.

In the *Durfee* case *supra*, it was held that the Massachusetts court which had jurisdiction over the husband, wife and children domiciled within that State had power to determine the custody and maintenance of the children, even though the marriage relationship had previously been dissolved in Rhode Island.

In the case of *Renner* v. *Renner* (N. J. Eq.), 181 A. 191, a wife took a minor child out of the State of New Jersey and journeyed to Nevada where she secured a divorce. She then married another man who adopted said minor child. The New Jersey court held that since the child's true domicile was in the State of New Jersey wherein the father was domiciled, the adoption proceedings were invalid and New Jersey need not give full faith and credit to such foreign adoption.

In the case of *Ex parte Peddicord*, 269 Mich. 142, 256 N. W. 833, it was held that Michigan did not violate the Full Faith and Credit Clause of the Federal Constitution by refusing to enforce a foreign divorce decree concerning custody of minor children in Michigan.

Certainly Michigan has the right to look after the custody and support of these minor children who are now living in Grand Rapids, Michigan. If an order should now be made in Michigan for the said minors' support, must the petitioner herein comply with both the Nevada and the Michigan decrees?

The right of a State where children are domiciled to have exclusive control of the matter of custody and support is unassailable. The same right applies to property.

As stated by Chief Justice Stone of this Court in his dissenting opinion in the *Yarborough* case *supra,* at page 217:

> "A statute, record or judgment of one state, establishing the right of an illegitimate or adopted child to inherit from his putative parent, may be given extra-state effect for many purposes, but it does not establish his right to inherit land in another state. See *Hood vs. McGehee, 237 U. S. 611; Olmstead vs. Olmstead, 216 U. S. 386.* Parties who have, in one state, litigated the proper construction of a will disposing of realty are not, by the judgment there, concluded in another state where the testator's realty is located. *Cf. Clark vs. Clark, 178 U. S. 186.* Nor will a divorce decree seeking to apportion the rights of the parties to realty be conclusive with respect to land outside the state. *Fall vs. Eastin,* 215 U. S. 1. The interest of a state in controlling all the legal incidents of real property located within its boundaries is deemed so complete and so vital to the exercise of its sovereign powers of government within its own territory as to exclude any control over them by the statutes or judgments of other states."
>
> *Yarborough* v. *Yarborough,* 290 U. S. 202, 545 S. Ct. 181.

While the Nevada divorce decree in question here does not purport to divide the real estate owned by the parties by the entireties and located in Michigan, the net result may be the same if the decree is sustained. Michigan has a statute providing that property held by husband and wife by the entireties becomes their property as tenants in common upon their being divorced, unless the decree makes disposition of the real property. See *Michigan Stat. Ann.* 25, 132. In the event the Nevada decree of divorce is held valid in the present action, respondent will insist upon a partition

of the home of the parties in Michigan where the petitioner is living, and which the parties own as husband and wife by the entireties. By such procedure respondent herein would be able to circumvent the universal holdings of this country to the effect that a foreign decree cannot control real estate of the mother State where the parties are domiciled.

The unassailable right of a mother State to control exclusively the minor children domiciled in such State was clearly expounded by Mr. Chief Justice Stone in his dissenting opinion in the *Yarborough* case *supra,* when he stated at page 225:

> "Whatever may be said of the local interest which was deemed controlling in those cases in which this Court has denied to a state judgment the same force and effect outside the state as is given to it at home, it would not seem open to serious question that every state has an interest in securing the maintenance and support of minor children residing within its own territory so complete and so vital to the performance of its functions as a government, that no other state could set limits upon it. Of that interest, South Carolina is the sole mistress within her own territory. See *Hood v. McGehee, supra, 615.* Even though we might appraise it more lightly than does South Carolina, it is not for us to say that a state is not free, within constitutional limitations, to regard that interest as fully as important and as completely within the realm of state power as the legal incidents of land located within its boundaries, or of a marriage relationship, wherever entered into but of which it is the domicile, or its power to pass upon the sanity of its own residents, notwithstanding the earlier pronouncements of the courts of other states."
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> *Yarborough* v. *Yarborough,* 289 U. S. 718, 53 S. Ct. 688.

WHEREFORE your petitioner prays for a Writ of Certiorari to the Supreme Court of Michigan to the end that the errors aforesaid may be corrected by this Court.

Respectfully submitted,

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